



October 28, 2019

Mr. Ben Welsh
DEPT MR 79822
411A Highland Ave
Somerville, MA 02144

Re: Freedom of Information Act Appeal No. 2019-APP-00108;
FOIA Case No. 2019-FPRO-01354

Dear Mr. Welsh:

This is in response to your letter dated September 23, 2019, which was received in our office on September 30, 2019. In your letter, you appealed from the action of Senior Government Information Specialist Nancy Chavannes-Battle on your request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, for access to "an electronic copy of all logos and illustrations of Mr. Zip..." After carefully considering your appeal, we are affirming Chavannes-Battle's action on your request in full. A decision on this matter is attached to this letter.

This is the final decision of the Postal Service regarding your right of access to records requested pursuant to the FOIA. You may seek judicial review of this decision by bringing suit for that purpose in the United States District Court for the district in which you reside or have a principal place of business, the district in which the records are located, or in the District of Columbia.

The Office of Government Information Services (OGIS) offers mediation services to resolve disputes between FOIA requesters and federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect the requester's right to pursue litigation. The contact information for OGIS is as follows:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road
Room 2510
College Park, MD 20740-6001
Email: ogis@nara.gov
Telephone: 202-741-5770
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Facsimile: 202-741-5769

For the General Counsel,

**James L.
Tucker**

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James L. Tucker
Date: 2019.10.28
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James L. Tucker
Attorney
Federal Compliance

Enclosure

cc: Nancy Chavannes-Battle
Keedah Bell
FOIAAppeal@usps.gov

OFFICE OF THE GENERAL COUNSEL
FEDERAL COMPLIANCE
HEADQUARTERS, WASHINGTON, D.C.

IN RE, APPEAL OF CASE NO.
2019-FPRO-01354
(ORIGINAL FOIA)

APPEAL NO. 2019-APP-00108

ATTORNEY JAMES L. TUCKER
ON BEHALF OF GENERAL COUNSEL THOMAS J. MARSHALL

OPINION AND ORDER

After careful consideration, this office is affirming Senior Government Information Specialist Nancy Chavannes-Battle's action on FOIA request 2019-FPRO-01354 in full.

I. STATEMENT OF FACTS

1. On August 30, 2019, the requester submitted a request under the Freedom of Information Act (FOIA) 5 U.S.C. § 552, for "an electronic copy of all logos and illustrations of Mr. Zip, the U.S. Postal Service's cartoon representative for the ZIP Code, in SVG or EPS file format."
2. In the initial decision dated September 13, 2019, Senior Government Information Specialist Nancy Chavannes-Battle denied the request pursuant to FOIA Exemption 3 in conjunction with 39 U.S.C. § 410(c)(2) which protects information of a commercial nature that would not typically be disclosed under good business practice.
3. The requester appealed Ms. Chavannes-Battle's decision and asserted that the Mr. Zip character is in the public domain because it was "created by public officials, on public time, and should be assumed to be in the public domain..."

II. APPLICABLE LAW

Congress enacted the FOIA to "pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." *Dep't of the Air Force v. Rose*, 425 U.S. 352 (1976). Congress balanced this objective by recognizing that "legitimate governmental and private interests could be harmed by release of certain types of information." *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 621 (1982). The FOIA "requires federal agencies to make Government records available to the public, subject to nine exemptions." *Milner v. Dep't of the Navy*, 562 U.S. 562, 562 (2011). In addition, other laws allow the Postal Service to withhold certain categories of records and information. See 39 U.S.C. § 410(c).

If information is "specifically exempted from disclosure by statute" then it also exempt from mandatory disclosure under the FOIA by incorporation. 5 U.S.C. § 552(b)(3) ("Exemption 3"). One such statute is Section 410(c)(2) of the Postal Reorganization Act. 39 U.S.C. § 410(c)(2) ("Section 410(c)(2)"); see also *Wickwire Gavin v. U.S. Postal Serv.*, 356 F.3d 588, 592 n.6 (4th Cir. 2004); *Carlson v. U.S. Postal Serv.*, No. 13-cv-06017-JSC, 2015 WL 9258072, at *4 (N.D. Cal. Dec. 18, 2015); *Airline Pilots Ass'n v. U.S. Postal Serv.*, No. 03-2384 (ESH), 2004 WL 5050900, at *5 (D.D.C. June 24, 2004). This statute also operates independently of the FOIA to exempt certain information from mandatory disclosure.

Section 410(c)(2) permits the Postal Service to withhold "information of a commercial nature, including trade secrets, whether or not obtained from a person outside the Postal Service, which under good business practice would not be publicly disclosed." 5 U.S.C. § 552(b)(3). "Information is of a commercial nature if it relates to commerce, trade, profit, or the Postal Service's ability to conduct itself in a businesslike manner." 39 C.F.R. § 265.14(b)(3); see also *Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1128-29 (9th Cir. 2007)(applying the common meaning of the term "commercial" to include all information that relates to commerce, trade, or profit). Section 410(c)(2) permits the withholding of a broader range of commercial information than similar FOIA exemptions. See *Carlson v. U.S. Postal Serv.*, 504 F.3d 1123, 1129 (9th Cir. 2007)(applying the "common meaning" of the term "commercial"). This broader scope exists because the Postal Service is commissioned to operate like a private corporation and therefore must follow sound business principles. *Id.* at 1127-28.

In determining whether particular information is commercial in nature, the Postal Service considers six factors relating to whether the information is more akin to its role as a business entity competing in the market or as a provider of public services. See 39 C.F.R. § 265.14(b)(3)(i). No single factor is determinative, but all are considered to determine the overall character of the information. 39 C.F.R. § 265.14(b)(3)(ii). In addition, the Postal Service has identified an extensive, though not exhaustive, list of information that is commercial in nature and thus exempt from disclosure under Section 410(c)(2). See 39 C.F.R. § 265.14(b)(3)(ii).

If the information is commercial in nature and would not be disclosed "under good business practice," then the FOIA does not require the Postal Service to disclose the information. *Wickwire Gavin*, 356 F.3d at 594-95. No separate analysis is necessary to consider whether disclosure would cause competitive harm or to balance the commercial interest with the public's interest in knowing the information. See *id.* at 594-95; *Carlson*, 2015 WL 9258072 at *8-10. In order to determine whether commercial information would be disclosed under good business practice, courts look to the common practices of other businesses. See *Carlson*, 2015 WL 9258072 at *8.

The FOIA usually does not permit selective disclosure of a record only to certain parties. See *U.S. Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 496 (1994). Once a record is disclosed to one requester under the FOIA, it generally must be disclosed to all members of the public who request it, i.e., disclosure to one is disclosure to all. Consequently, in determining whether an exemption applies with respect to a record requested under the FOIA, an agency generally must consider the consequences of disclosure of the record to the public at large, not just to the requester. See *Forest Serv. Emps. for Envtl. Ethics v. U.S. Forest Serv.*, 524 F.3d 1021, 1025 (9th Cir. 2008).

III. LEGAL ANALYSIS

In this instance, the following factors support our conclusion that the information is commercial in nature:

(B) Relates to the Postal Service's activities that are analogous to a private business in the marketplace. 39 C.F.R. § 265.14(b)(3)(i)(B).

(C) Would be of potential benefit to individuals or entities in economic competition with the Postal Service, its customers, suppliers, affiliates, or business partners or could be used to cause harm to a commercial interest of the Postal Service, its customers, suppliers, affiliates, or business partners. 39 C.F.R. § 265.14(b)(3)(i)(C).

(D) Is proprietary or includes conditions or protections on distribution and disclosure, is subject to a nondisclosure agreement, or a third party has otherwise expressed an interest in protecting such information from disclosure. 39 C.F.R. § 265.14(b)(3)(i)(D).

The Mr. Zip character and any images thereof are copyrighted material owned by the Postal Service. The Postal Service owns an extensive intellectual property portfolio including numerous copyrights, trademarks and patents, and has a robust and profitable licensing program in which third parties compensate the Postal Service for the use of its copyrights and trademarks. Beyond licensing for profit, this intellectual property is used in a multitude of ways to support business operations and advance commercial interests, such as marketing and brand enhancement. The Postal Service vigorously enforces its intellectual property rights both to protect its ability to monetize these valuable assets and protect its brand by insuring that images, logos and characters associated with the Postal Service are not used in ways that might reflect poorly upon the organization or tarnish its reputation. As such, the requested information qualifies as commercial information.

In addition, here, the information you requested would not be released "under good business practice" because such release would compromise the Postal Service's ability to enforce, and ultimately profit from its copyright interest in the Mr. Zip character. Private companies who own copyrights to various characters and materials do not typically provide copies of that material without compensation or some formally enshrined limitation on use and distribution thereof. Accordingly, this information is exempt from disclosure under Exemption 3 of the FOIA and Section 410(c)(2).

IV. CONCLUSION

For the foregoing reasons, Ms. Chavannes-Battle action on FOIA Case No. 2019-FPRO-01354 is hereby affirmed in full.

For the General Counsel,

James L.
Tucker

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James L. Tucker
Attorney
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